Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

FINAL ORDER PO-1806-F

Appeal PA-000003-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all records in the possession of the Ministry relating to compliance by a named company (the affected party) with sections 2.1 and 2.2 of an order made against it pursuant to section 18 of the Environmental Protection Act. The order was served on the affected party by the Ministry on May 4, 1999. The requester, representing an environmental organization, provided this office with the specific requirements from the Order relating to the requested information.

The Ministry notified the affected party under section 28 of the Act. The affected party objected to the disclosure of the responsive records to the appellant. Based on the submissions received from the affected party, the Ministry denied access to the records, claiming the application of the exemptions found in sections 17(1)(a), (b) and (c) of the Act to them.

The requester, now the appellant, appealed the Ministry's decision. In her appeal materials, the appellant has raised the possible application of section 23 of the Act, the so-called "public interest override", and section 11 of the Act, which obliges an institution's head to disclose any record to the public where he or she has reasonable and probable grounds to believe that it is in the public interest to do so as the record reveals a grave environmental, health or safety hazard to the public. In addition, the appellant objects to the contents of the Ministry's decision letter, claiming that it lacks the particulars required by section 29(1)(b) of the Act.

During the mediation stage of the appeal, the appellant agreed to withdraw her reliance on the provisions of section 11.

I decided to first seek the representations of the parties resisting the disclosure of the records, in this case the Ministry and the affected party, both of whom made submissions. In Interim Order PO-1780-I, I ordered that the non-confidential portions of the representations of the Ministry and the affected party be shared with the appellant, who was also invited to make submissions. Upon receipt of the representations of the appellant, the non-confidential portions of her submissions were also shared with the Ministry and the affected party, who were requested to make any additional submissions by way of reply pertaining particularly to the application of section 23 to the requested information. The affected party chose to make further reply representations responding to the issues raised by the appellant's submissions.

The records consist of two documents: 1) Preliminary Report: Options and Technologies for Management of Trenton Mill Dissolved Solids, dated July 3, 1999, and 2) Options and Technologies for Management of Trenton Mill Dissolved Solids, Preliminary Engineering and Design, dated October 3, 1999. Included with these two documents are a fax cover sheet and two covering letters from the affected party's solicitors.

DISCUSSION:

THIRD PARTY INFORMATION

General Principles

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, M-29 and M-37]

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

The Ministry indicates that it is no longer relying on the exemption in section 17(1)(b) and the affected party's submissions do not consider this section. Based on my review of the records and the submissions of the parties, I agree that it has no application in the present appeal and will not address it further in this order.

Part One of the Test - Types of Information

The affected party submits that:

> . . . The Reports (the records at issue) are primarily a summary of research and development efforts by employees of (the affected party) towards the objective of obtaining an alternative to the use of Dombind as a dust suppressant and this represents applied science for which (the affected party) has made significant investment.
>
> . . . The Reports contain highly technical, scientific, commercial and financial information intended to be developed to the point of a working technology at considerable expense to (the affected party). . . The technological advances proposed in the Reports represent trade secrets. . . It is anticipated that the development of the new technology may be sufficiently unique to permit the application for patents.

The appellant has not addressed the application of section 17(1) to the records in her representations but did so in her letter of appeal where it was emphasized that the affected party and the Ministry are obliged to tender evidence which is detailed and convincing in support of their contention that the records are exempt under that section. Her submissions focus, in greater detail, on the "public interest override" provision in section 23.

The terms trade secret and scientific, technical, commercial and financial information have been defined in previous orders of the Commissioner's office.

Trade Secret

"Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[Order M-29]

Scientific Information

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.

[Order P-454]

Technical Information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

[Order P-454]

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

[Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. For example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

[Orders P-47, P-87, P-113, P-228, P-295 and P-394]

In my view, the records at issue contain information which satisfies all of the definitions referred to above. Both records describe in great detail the various options available to the affected party in responding to the Ministry's Control Order ER-416, item 2.2. Each of the options are weighed and considered, taking into account the scientific, technical, financial and commercial implications that would flow from their adaptation. The records also contain very specific references to manufacturing processes which may properly be described as trade secrets belonging to the affected party which have economic value from not being known by its competitors. Based on the information provided by the affected party and my review of the records themselves, I am satisfied that the information contained therein qualifies as a trade secret or scientific, technical, commercial and financial information within the meaning of section 17(1).

Part Two of the Test - Supplied in Confidence

In order to satisfy the second part of the section 17(1) test, the Ministry and/or the affected party must show that the information was supplied to the Ministry, either implicitly or explicitly, in confidence.

There is no dispute that the information contained in the records was supplied by the affected party to the Ministry.

As far as the confidentiality aspect of the second part of the test is concerned, the Ministry and the affected party must demonstrate that an expectation of confidentiality existed at the time the information was submitted, and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the Ministry.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The affected party submits that:

> . . . The information contained in the Reports was not intended to be available to the public. The need for confidentiality was discussed with representatives of the MOE in the negotiations resulting in the Order of April 29, 1999. It was understood that the MOE

> would respond to any questions from third parties regarding the Reports by simply indicating that the Reports and (the affected party) were in compliance with the Order.
>
> The Reports were provided in accordance with the Order and the information was always understood by (the affected party) to be confidential. It is not information that is otherwise available to the public except through this release of information procedure.
>
> The Reports were prepared for the purpose of compliance with the Order and this is not a purpose that entailed disclosure to the public. The Order required the delivery of the Reports, but did not require, nor contemplate the release of the Reports to third parties.

In my view, the representations of the affected party sufficiently establish a reasonably held expectation that the information contained in the records which it supplied to the Ministry would be treated in a confidential manner. There is no explicit statement regarding confidentiality contained in the records themselves. However, I accept the evidence of the affected party that through its discussions with the Ministry at the time the Order was being prepared, it was understood that any documents which it provided in accordance with its obligations under the Order would be treated confidentially by the Ministry.

Accordingly, I am satisfied that the information contained in the records was supplied by the affected party to the Ministry with a reasonably held expectation that it would be treated confidentially. The second part of the section 17(1) test has, therefore, been met.

Part Three of the Test - Harms

The affected party has provided me with detailed evidence of what it perceives will occur should the records be disclosed. It argues that:

> The Reports contain information particular to the pulping processes at the Trenton Mill which are not generally known and have economic value to (the affected party) from not being generally known.
>
> The capital expenditure on technology to comply with the Order must be accomplished secure in the knowledge that the investment will not be for the benefit of competitors not having to incur the same investment in research and development costs.
>
> The monitoring of the activities of competitors within the pulp and paper industry is vitally important towards obtaining any advantage that will assist in increasing market share or over-all profitability. Detailed knowledge by a competitor of technological advancement is sensitive information that would assist a competitor in predicting the profitability of (the affected party's) operations and thereby assist the competitor's ability to make strategic decisions which may, directly or indirectly, confound the business plans of (the affected party) and the Trenton Mill.

> (The affected party) has identified several potential technologies in the (records). By February 4, 2000 (the affected party) must select a preferred alternative and identify suppliers. It is important that options for consideration, as well as the details of the preferred alternative, be kept confidential. Knowledge of the rejected options is as valuable as the selected option. Competitors should not have the benefits of (the affected party's) background research into the technologies considered for the selection and the reasons that some options were preferred over others.

The confidential portions of the affected party's submissions which were not disclosed to the appellant also contain compelling reasons why the disclosure of the records could reasonably be expected to result in harm to the affected party's competitive position, particularly with its suppliers and customers. Each of the options examined in the records impacts differently on how the affected party carries on its business, with its competitors, suppliers and customers. The disclosure of the information contained therein, particularly the marketing information, could reasonably be expected to negatively impact on the affected party's competitive position.

In my view, the affected party has provided me with the kind of "detailed and convincing" evidence required to satisfy the third part of the test under sections 17(1)(a) and (c). I find that the affected party has provided me with sufficient evidence to demonstrate that the disclosure of the information contained in the records could reasonably be expected to result in harm to its competitive position and would result in undue gain to its competitors and undue loss to the affected party. I accept that the industry in which the affected party operates is a competitive one with low profit margins which are dependant on technological innovations to maintain one's market position. In my view, the disclosure of the information contained in the records could reasonably be expected to undermine the affected party's position vis a vis its' competitors.

As all three parts of the section 17(1) test have been met, I find that the records at issue are exempt from disclosure under that exemption.

PUBLIC INTEREST IN DISCLOSURE

General Principles

The majority of the appellant's submissions concern the application of section 23, the "public interest override" to the records. This section provides that:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [my emphasis]

It has been established in a number of orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this

interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appear refused (January 20, 2000), Doc. 27191 (S.C.C.)].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of the exemption which I have found to apply, in this case, section 17(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The Appellant's Submissions

In her representations, the appellant submits that there is a compelling public interest in the disclosure of the records because the public has not been informed as to whether or not the affected party has canvassed a suitably wide range of waste treatment options. She argues that the disclosure of the information contained in the records would reveal which options were evaluated by the affected party and why the preferred option was chosen over the others. The appellant indicates that the option ultimately chosen by the affected party as the preferred process for compliance with the Ministry's order has not been tested as operable in a commercial setting. Another process, which may or may not have been considered by the affected party, has met with commercial success. The appellant has provided evidence in the form of a letter to the Ministry's Environmental Assessment and Approvals Branch that the public advocacy group which she represents, as well as other environmental organizations and individuals wish to be informed as to whether this second method was one of the technologies considered by the affected party. It must be noted that the appellant's concerns revolve around the "environmental appropriateness of the chosen treatment technology", not just the cessation of the use of Dombind as a dust suppressant on rural roads.

However, in her letter of appeal, the appellant states that the purpose of the request was to determine whether the affected party is meeting the deadlines prescribed in the Ministry's section 18 Order. She submitted that the request was designed to ensure that the appellant, the organization which she represents and other conservation organizations are able to monitor the affected party's fulfilment of the Ministry's section 18 Order. The letter of appeal focusses specifically on the public's interest in the risks associated with the use of Dombind as a dust suppressant in the natural environment, as opposed to the environmental hazards associated with the affected party's proposed treatment of Dombind pursuant to the Ministry's section 18 Order. The public interest at the time of the appeal was in whether the affected party was in compliance with the Ministry's order, rather than with the specific options examined by the affected party in achieving compliance with the order.

The appellant submits that there is sufficiently widespread public interest in the subject matter of the records to be considered compelling, as contemplated by section 23, and that it outweighs the purpose of the section 17(1) exemption. The majority of her submissions on this portion of the application of the public interest override in section 23, which is contained in her letter of appeal, addresses the question of the use of Dombind on rural roads as opposed to the treatment of this substance by the affected party following its withdrawal, which is the subject matter of the records at issue.

The Affected Party's Submissions

The affected party submits that there no longer exists a public interest in the subject matter of the records because the options which are discussed in them will not be pursued. Rather, the affected party suggests that the public interest has been met by its disclosure of a report dated February 3, 2000, which has been made available to the public, setting out the preferred option. The affected party argues that the public interest lies in:

> . . . knowing the impact of the selected option for the elimination of Dombind.. There is no public interest in obtaining information concerning background research into technological options which will not be pursued and cannot be pursued given that the Director's (section 18) Order is "lock-step" and "rachets" forward. The selection of the options identified in the report of February 3, 2000 must be pursued through the process of the application for Certificates of Approval and ultimate implementation of the technology. A comparison of the non-selected options with the selected option, as the Appellants seem to suggest, is irrelevant.

The affected party continues:

> The Director's Order did not require (the affected party) to canvass " a wide range of options". Rather, the Director's Order only required a "report outlining options and technologies for the elimination of Dombind." Therefore, the basis upon which the appellants seek the disclosure of the records is premised upon a faulty argument that (the affected party) was required to study and canvass a wide range of options. . . .
>
> (The affected party) invested substantial resources in identifying and sifting through the varied options for the elimination of Dombind as a dust suppressant. It cannot be found that the (records at issue) have any compelling public interest that would outweigh the substantial confidentiality concerns of (the affected party) where the information was provided to the government as a result of a Director's Order in circumstances where it was agreed that only the fact of the reports being submitted but not the contents of the report would be disclosed to the public.
>
> . . .

> . . . the background study summarized by the (records at issue) represents confidential information not to be disclosed by reference to section 17 of the Act. There is no compelling reason for the public to have the benefit of the (affected party)'s labour and efforts in selecting and sifting through technologies. . . There is nothing in the reports which assists the public in any way to express public opinion or make political choices as this information was prepared solely for the purpose of assisting (the affected party) with deciding upon a technological, commercial and business plan to accomplish the eventual elimination of Dombind.

Findings

Is there a Compelling Public Interest in the Disclosure of the Records?

In my view, the interest expressed by the appellant is indeed a public, as opposed to a private, one. Her concerns are not personal to her or to the members of the organization which she represents. Rather, these interests are those of the broader Ontario population, particularly those who live in the vicinity of the affected party's Trenton Mill. I will now address the question of whether the public interest is sufficiently compelling to satisfy the requirements of section 23.

In Order P-1398, former Inquiry Officer John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Inquiry Officer Higgins's decision in Order P-1398, the Court of Appeal for Ontario in Minister of Finance (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at 342].

In light of the Court of Appeal's comments, I adopt former Inquiry Officer Higgins's interpretation of the word "compelling" contained in section 23.

The use of Dombind as a dust suppressant on rural roads has clearly been the subject of a great deal of public debate. This is reflected in the decision of the Ministry to move towards its gradual elimination, now scheduled to take place at the end of this year. I am satisfied that there exists a compelling public interest in the continued use and now the elimination of this substance on Ontario roads. As a result of the advocacy of organizations such as that represented by the appellant, the Ministry has taken steps, including the issuance of a section 18 Order by the Director, to eliminate the environmental impact of its use. The

appellant suggests that there exists a similarly compelling public interest in the subject matter of these records, the options canvassed by the affected party in determining how the components of Dombind will be disposed of in the future.

While the reports at issue relate to the affected party's future disposal of the ingredients of the Dombind compound, I cannot agree that this issue has "roused" a similar degree of public interest or attention as that surrounding the use of Dombind as a dust suppressant. The appellant refers to a letter sent on April 23, 2000 by several environmental organizations and a number of private individuals to the Ministry raising their concerns with the preferred option chosen by the affected party for the disposal of Dombind. However, the letter is in response to two Ministry postings relating to the Ministry's "stated intent that the paper mill waste called Dombind be removed from use as a dust suppressant on rural roads by the end of this year." The writer of the letter makes reference to the subject matter of this appeal and goes on to comment in great detail on the technical components and shortfalls of the affected party's proposed option.

I cannot agree that there exists the requisite degree of public interest in the various options explored by the affected party in the future disposal of the elements which were used in the past to create Dombind. There clearly exists a compelling public interest in the on-going environmental impact of the disposal of waste from the affected party's Trenton Mill. This is evidenced by the interest expressed over many years concerning the use of Dombind as a dust suppressant on Ontario's rural roads and the interest expressed over how the mill's by-products will be disposed of in the future. I am not satisfied, however, that this compelling public interest extends to include a public review of whether the option ultimately adopted by the affected party is the most environmentally friendly one available to it.

In addition, I find that the appellant has not established that the disclosure of the information contained in the record will serve the purpose of informing the citizenry about the activities of their government. The Ministry's actions in the debate over the use of Dombind and the future disposal of its components has not been the focus of the public debate. Accordingly, I find that the appellant has not established that there exists a "compelling public interest" in the subject matter of these records for the purposes of section 23.

In order to address fully the appellant's representations, I will also examine whether the public interest in the disclosure of the contents of the records, if it were to exist, clearly outweighs the purpose of the section 17(1) exemption.

Does the Public Interest Clearly Outweigh the Purpose of the Section 17(1) Exemption?

The purposes of section 17(1) of the Act (the commercial exemption for non-governmental organizations) were articulated in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure

> of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

In my view, the affected party has established that the records contain commercially valuable information whose disclosure could reasonably be expected to result in harm to its competitive position in what is clearly a very competitive marketplace. I am not satisfied that there exist the kind of public safety concerns which were determinative of this issue in the previous decisions of the Commissioner's office where records relating to safety concerns at Ontario Hydro's nuclear facilities were at issue (Orders P-1190, PO-1805 and P-270). The records at issue in this appeal do not address the kind of public safety issues which clearly take precedence over a party's right to maintain the confidentiality of its commercial information. The information at issue in this appeal cannot be said to relate to environmental concerns which would obviate the need for the continued commercial confidentiality of the records.

I conclude by finding that the public interest in protecting the business interests of the affected party in this case is not clearly outweighed by the public interest in the disclosure of these particular records. As such, I find that section 23 has no application in the present circumstances.

ORDER:

I uphold the Ministry's decision to deny access to the requested records.

Original signed by: July 18, 2000
Donald Hale
Adjudicator